IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1320

EDWARD V. HANRAHAN, JOHN P. MEADE, JOHN MULCHRONE, DANIEL R. GROTH, JOHN CISZEWSKI, WILLIAM CORBETT, RAYMOND BRODERICK, JOSEPH F. GORMAN, GEORGE W. JONES, EDWARD T. CARMODY, AND JAMES DAVIS,

Petitioners,

vs.

PEOPLE ex rel. BARNABAS F. SEARS, AS SPECIAL STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,

and

BECAUSE OF SUPREME COURT RULE 21(4) RICHARD JALOVEC, CHARLES KOLUDROVIC, JOHN SADUNAS AND HON. PHILIP J. ROMITI, JUDGE OF THE CRIMINAL DIVISION OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONERS' REPLY BRIEF

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Citations

Cases:

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PETITIONERS' REPLY BRIEF

Respondent's Brief ignores the Questions Presented by the Petition for Writ of Certiorari.

Instead, Respondent asserts, among other things, that Petitioner's 14th Amendment rights in grand jury proceedings—sanctioned by the Illinois Supreme Court in its June 23, 1971 opinion (*People ex rel. Sears* v. *Power*, 49 Ill. 2d 14)—have somehow dissolved because that court "changed its mind" (Resp. Brief, p. 28) in its December 17, 1971 opinion (*People ex rel. Sears* v. *Romiti*, 50 Ill. 2d 51).

If, in fact, Respondent is correct and the Illinois Supreme Court has "changed its mind" and no longer requires that grand jury proceedings meet Constitutional standards of due process, that judgment is obviously repugnant to the federal Constitution and must not be tolerated by this Court.

Respondent thus concedes that Petitioners have been treated differently from all other persons under Illinois law and that, by its 4-3 decision of December 17, 1971, the Illinois Supreme Court has been making up new rules in favor of Respondent as it goes along in this case.[1]

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1. Under the June, 1971 opinion all persons in Illinois are entitled to a fair and unbiased grand jury in accordance with due process of law. Under the August, 1971 decision (Respondent's Brief, Appendix B) Petitioners were ordered to respond to the indictment and thereafter to proceed "according to law". However, when Petitioners sought to follow that directive, the Illinois Supreme Court itself denied them due process and equal protection when, by its December 17, 1971 judgment attacked herein, that Court refused Petitioners the hearing provided by statute to show their 14th Amendment rights had been violated.

The constitutional principles raised by the Questions Presented are of national importance because they affect every jurisdiction having a grand jury system.

The constitutional issues have three underlying facets:

1) An indictment procured in violation of 14th Amendment rights of an accused is invalid.

2) The highest court of a State may not constitutionally refuse an accused a hearing to prove his 14th Amendment rights were so violated.

3) No one should be held to trial when to do so would destroy his 14th Amendment rights and leave him with no remedy to prevent the lifetime damage to his personal and public reputation caused by an invalid indictment.

In his brief, Respondent won't face those constitutional issues, even though they were created by his actions. Instead, he seeks denial of this Petition for Certiorari on the claim that the judgment of the Illinois Supreme Court is not "final".

I.

The December 17, 1971 Judgment of the Illinois Supreme Court Is "Final" Under 28 U. S. C. 1257 (3).

A. In the Illinois Supreme Court Respondent filed an *original* lawsuit, completely independent of the indictment proceedings, challenging Petitioners' right to such a hearing. Customary adversary procedures were followed in that prohibition and mandamus action, as in any other distinct lawsuit: summons was issued by the Illinois Supreme Court and served upon Petitioners; they filed answers and briefs; oral argument was held. On the constitutional issues raised there by Petitioners (which are the Questions Presented by this Petition for Certi-

orari), the Illinois Supreme Court then entered its final judgment, which is the subject of attack here.

By that court's judgment Respondent obtained a writ of prohibition and mandamus. That judgment (which is the final pronouncement on the issue by Illinois' highest court) prohibited the hearing ordered by the trial court on the factual issues raised by Petitioners' motion to dismiss the indictment because of prosecutorial misconduct and prejudicial publicity violating Petitioners' 14th Amendment rights. It finally extinguished Petitioners' constitutional rights—in Illinois courts.

Respondent also argues that the Petition for Certiorari is a piece-meal review, thereby inferring that Petitioners may raise the issue *after* trial.[2]

Obviously, that judgment makes it completely useless for Petitioners to undergo trial and, if convicted, appeal

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2. The right of an accused to be tried only *after* the validity of an indictment has been adjudicated is codified in Illinois by Ch. 38, Section 114-1, Ill. Rev. Stat. 1971, which grants to the accused the right to attack the validity of an indictment before trial. That statute provides for a hearing on all contested issues of fact. If, after such a hearing, the indictment is held to be invalid, the accused is discharged. If the State appeals and the invalidity of the indictment established at the hearing is sustained, of course there never is a trial.

The trial court recognized Petitioners' right to such hearing on the disputed factual issue of whether prosecutorial misconduct by the Respondent and massive prejudicial publicity had violated their 14th Amendment rights to an unbiased grand jury so as to invalidate the indictment. Therefore, it ordered such a pre-trial hearing. That hearing was prohibited by the December 17, 1971, Illinois Supreme Court judgment.

to the Illinois Supreme Court because that court has already decided that issue against them. Just describing that procedural waste required by Respondent's argument (trial, appeal to the Illinois Appellate Court, and appeal to the Illinois Supreme Court—only to have Petitioners' arguments rejected because already decided against them by that highest state court) clearly shows the finality of the Illinois Supreme Court judgment. Certainly 28 U.S.C. Section 1257 (3) never contemplated Petitioners' going through such rigamarole in order to have their 14th Amendment right not to be tried under an invalid indictment protected by the U. S. Supreme Court. Besides, that's exactly why this Petition is not piece-meal review: unlike the cases cited by Respondent in his brief (p. 24, 25), here the highest state court has already decided the case against Petitioners.

B. Respondent would have this Court require trial and conviction before Petitioners could exercise their constitutional right not to be tried on an invalid indictment! (Respondent's Brief, p. 24, 25, 32). Just to state that argument exposes its absurdity and unconcern for one of man's most precious assets, his good reputation.

Respondent's argument assumes that acquittal is an adequate remedy for trial on an invalid indictment. However, the damage done a man's personal and public reputation—even though he is acquitted—can never be undone because an invalid indictment leaves an indelible stain not removed by acquittal. *In Re Fried*, 161 F. 2d 453. Therefore, a hearing before trial, enabling Petitioners to establish that the indictment was invalid in the first place, is indispensable to afford them their right to a complete constitutional remedy.

That is the reason Petitioners seek Certiorari. They are innocent; nevertheless, they have been invalidly indicted. Because this case has received nation-wide publicity, many persons are under the false impression that there were reasonable grounds for the indictment. Petitioners have a constitutional right to a hearing before trial to show this indictment is invalid. They should not be penalized by having to undergo trial in order to exercise that constitutional right, particularly since acquittal not only fails to remove the stain of an invalid indictment but also actually prevents Petitioners from ever being able to expose the invalidity at a hearing.

The Court has repeatedly declared that no burden can be placed on the exercise of constitutional rights and that no man must pay any "price" in order to enjoy his constitutional rights. See *United States* v. *Jackson*, 390 U.S. 570, where this Court held a provision of the Federal Kidnapping Act unconstitutional because it set a price for asserting the right to trial by jury and thereby impaired free exercise of that constitutional right.

Speaking for this Court, Justice Stewart stated: "If the provision [in the Federal Kidnapping Act] had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." (390 U.S. 570, 581). The Illinois Supreme Court judgment attacked herein prohibits Petitioners—*not only before trial but even after trial*—from ever having a hearing to prove that the indictment was invalid. That judgment doesn't just "chill" Petitioners' 14th Amendment rights; it freezes them.

C. Respondent himself created the finality of the state court judgment which enables certiorari by this Court.

If he had followed customary procedure, the hearing ordered by the trial court to determine whether Petitioners' 14th Amendment rights were violated would have been held. If Petitioners were successful at that hearing, the indictment would have been dismissed without trial. Respondent then could have followed customary procedure for review of that trial court decision. If Petitioners were not successful at that hearing, trial would have commenced. In either event, if Respondent and the Illinois Supreme Court had followed customary procedure, at least Petitioners would have been granted their 14th Amendment rights to a hearing *before trial* to establish invalidity of the indictment. Clearly, if customary procedure had been followed—regardless of which party was successful in the trial court and regardless of which party appealed, there would be no question that the Illinois Supreme Court judgment on that issue would be "final".

Respondent, having thus side-stepped customary procedure, deprived Petitioners of any hearing to prove their 14th Amendment rights were violated and created the finality of the Illinois Supreme Court judgment warranting certiorari.[3]

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3. Because Illinois Supreme Court Rule 604 (Ch. 110A, Section 604, Ill. Rev. Stat. 1971) prohibited the State from appealing that order in the indictment proceedings, Respondent filed a new and independent lawsuit in the Illinois Supreme Court (which has original jurisdiction for writs of prohibition and mandamus) challenging the jurisdiction of the trial court to hold the hearing. The writ was granted, barring the hearing. If the proceeding in prohibition and mandamus was not a distinct, independent lawsuit, as Respondent contends here, then it was an interlocutory appeal—in viola-

D. In like cases this court has recognized that a writ of prohibition provides the finality necessary to establish jurisdiction for certiorari: *Rescue Army* v. *Municipal Court*, 331 U.S. 549; *Bandini* v. *Superior Court*, 284 U.S. 8; *Bryant* v. *Zimmerman*, 278 U.S. 63; *Weston* v. *Charleston*, 2 Pet. 449, 464. Furthermore, this court now has before it two cases involving the conduct of proceedings before grand juries wherein certiorari has been granted. In *Branzburg* v. *Hayes*, Sup. Ct. Docket No. 70-85, 402 U.S. 942, certiorari was granted to review the judgment of the Kentucky Court of Appeals in an original action filed in that state court for a writ of prohibition to interrupt pending criminal proceedings in the Kentucky trial court. Certiorari has been granted in *In Re Pappas*, Sup. Ct. Docket No. 70-94, 402 U.S. 942, which stems from an opinion of the Supreme Judicial Court of Massachusetts issued in exercise of its supervisory authority over lower courts in that State.

II.

Petitioners' Statement of the Case Is Complete and Accurate.

Respondent asserts that Petitioners' Statement of the Case fails to make a complete disclosure of the facts. The fact is, however, that Petitioners' Statement of the Case contains a concise and accurate description of all facts necessary to determine the constitutional issues

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tion of Illinois Supreme Court Rule 604. That in itself would be an invidious discrimination violating Petitioners' constitutional rights to equal protection and due process because then Petitioners will have been the only persons under Illinois law denied the protection of Illinois Supreme Court Rule 604.

raised by the Petition and all material facts with regard thereto before the Illinois Supreme Court. None of the additional facts volunteered by Respondent (most of which relate to proceedings *subsequent* to the Illinois Supreme Court's judgment) is necessary or relevant to determine the Questions Presented, which are simply and clearly presented, ripe for determination and of compelling constitutional significance.

III.

The Additional Grand Jurors' Statements Corroborate Petitioners' Claim of Prosecutorial Misconduct Before the Grand Jury in Violation of their 14th Amendment Rights.

Respondent refers to statements of three grand jurors, filed with the Trial Court on March 23, 1972 (Respondent's Brief, Appendix E) as if they support his innocence, contrary to the charge of prosecutorial misconduct made in the affidavits attached to the Petition (Appendix C). These statements attached by Respondent to his Brief actually confirm Respondent's prosecutorial misconduct and its prejudicial impact on the grand jurors. For example, grand juror Phyllis Hymon (Respondent's Brief, Appendix E, Page 37a) states: "If somebody didn't believe him [Sears] he would go out of his way to help the juror". To the same effect is the statement of grand juror Dorothy Lewis (Page 38a): "We jurors did not know anything about what indictments to bring so we relied heavily on Mr. Sears' recommendations". The statement of grand juror Helen J. Doering (Page 40a) confirms Respondent's failure to comply with Judge Power's instructions to the grand jury to investigate possible violations of Illinois law by *both* the occupants of the Black

Panther apartment as well as law enforcement officials: "If we had investigated the Black Panther party we might have been there for two years. We jurors didn't know how we could go about investigating the Black Panther Party".[4]

These statements corroborate the affidavits filed by Petitioners (Petition, Appendix C) and emphasize the necessity for holding the factual hearing requested by Petitioners to determine whether or not their 14th Amendment rights were violated.

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4. In his Brief (p. 4) Respondent states that the grand jury was foreclosed from any inquiry into any criminal conduct of the occupants of the Black Panther apartment. That statement is false. *The grand jury was foreclosed by Respondent's own dereliction.*

Petitioner Hanrahan, the elected State's Attorney, had been displaced by appointment of Respondent as Special State's Attorney on June 26, 1971. Respondent thereby became the only person authorized to reinstate the charges against the apartment occupants before October 15, 1971, the time within which those charges could be reinstated under Illinois law. Thus Respondent had almost four months within which to take such action. However, he apparently made his own decision not to do so because he did not even seek convention of the special grand jury until *after* expiration of the time within which those charges could have been reinstated.

Respondent could also have presented new and additional charges to the grand jury for its consideration before expiration of the Statute of Limitations. That deadline was months after Respondent's appointment and on some possible charges had not expired before the grand jury's discharge. The foregoing clearly shows Respondent's conduct of the grand jury investigation was prejudicially one-sided, in violation of Judge Power's order.

IV.

Substantive Constitutional Rights Should Never Be Subordinated to Judicial Convenience.

Respondent tries to dissuade this Court from its duty to enforce invaluable 14th Amendment rights necessary to provide due process and equal protection in every jurisdiction having a grand jury system. He suggests that for this Court to enforce Petitioners' rights would delay and disrupt its judicial administration. That argument makes the regular flow of cases more important than individual rights. However, this Court has consistently rejected such appeals to judicial convenience, as shown by a line of recent cases from *Escobedo* v. *State of Illinois*, 378 U.S. 478 and *Miranda* v. *State of Arizona*, 384 U.S. 436 to *Griffin* v. *State of Illinois*, 351 U.S. 12 and *Mayer* v. *City of Chicago*, 404 U.S. 189. The nationally important constitutional issues raised by this Petition deserve no less consideration.

CONCLUSION

The Petition for a Writ of Certiorari enables this Court to preserve the integrity of the grand jury system from the corruption which will inevitably occur if State courts refuse to apply 14th Amendment standards of due process and equal protection of law to their conduct of grand jury proceedings. The need for this Court's intervention is emphasized by the following statement of the Illinois Public Defender Association in its *amicus curiae* brief, filed in support of Petitioners' petition for a rehearing of the Illinois Supreme Court judgment attacked herein:

> "Under the rationale of the proposed opinion a prosecutor could walk into a grand jury room with

a fistful of ten dollar bills and bribe 12 of the grand jurors into indicting someone, but the court could not inquire and the honest grand jurors could not talk about it . . . Vicious prosecutors will be able to use 'the grand jury as an engine of oppression and be entirely safe from inquiry under a seal of secrecy which would prevent investigation'. *Attorney General v. Pelletier*, 134 N. E. 407, 419 (Mass. 1922) . . ."

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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